NO. 2649

United States

Circuit Court of Appeals

For the Ninth Circuit

S. H. MILWEE AND W. H. BALDWIN,
Plaintiffs in Error,

vs.

WM. N. C. WADDLETON,
Defendant in Error.

Brief for Plaintiffs in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISRICT OF ALASKA, DIVISION NUMBER 1.

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STATEMENT OF THE CASE

This was an action of ejectment brought by the Defendant in Error, who will hereinafter be referred to as the Plaintiff, against the Plaintiffs in Error, who will hereinafter be referred to as the Defendants, to recover a certain lot in the town of Juneau, Alaska. The title alleged by the plaintiff was under the ten years statute of limitation. The ouster alleged was on the 12th day of June, 1914. The defendant Baldwin answered that he was in possession only as a tenant of Milwee; the defendant Milwee plead title in fee simple.

In his Amended Reply the plaintiff denied the title of the defendant and again reiterated his plea of title by limitation.

The case was tried to a jury. At the conclusion of the evidence the defendants moved the Court to direct a verdict for the defendants upon the grounds, first—plaintiff has failed to produce any evidence which should support a verdict for him; second—plaintiff has failed to produce in evidence any deed or other muniment of title to the premises in controversy, but relies solely upon the ten years statute of limitation, and the evidence fails to show

that the plaintiff took or held any possession of the property adversely to the owner under an honest bona fide belief or claim of ownership, but such possession as plaintiff had was at all times subordinate to the true title and the evidence further fails to show that the possession of the plaintiff was exclusive and actual as to any definite portion of said premises and is therefore insufficient to support a verdict for anything in plaiff's favor. (Record Page 45.) The Court denied the motion and the defendants reserved their exception. The Court thereupon instructed the jury to return a verdict for the plaintiff for an undivided two-thirds interest of the lot on controversy, to which instructions the defendants excepted. (Record Pages 45 and 46.) The Court then submitted to the jury instructions as to the remaining one-third interest. The jury returned a verdict for the plaintiff and the defendants filed their Assignments of Error (Record Page 47) and brought the case here by Writ of Error.

The lot in controversy is a part of the patented townsite of Juneau (Record Page 24.) The lot was by the townsite trustee, Thos. R. Lyons, conveyed to James H. Pullen, Marry H. Wilson and Thomas R. Wilson on November 10th, 1898. (Record Pages 24 to 27.)

The testimony for the plaintiff shows that he was claiming the lot and was occupying it, or claiming to occupy it, prior to the date of the trustee's deed; that he was a party to the contest before the

townsite trustee between himself and the said Pullen, Mary H. Wilson and Thomas R. Wilson; that as a result of said contest the lot was awarded to the said Pullen and Wilsons; that the plaintiff appealed from the decision of the townsite trustee, but the said decision was affirmed by the Commissioner of the General Land Office. The plaintiff continued to occupy a small cabin which had formerly been a little barn on one corner of the premises from that time on and testified that he claimed the premises as his own. Plaintiff also paid, during said period, the taxes to the City of Juneau on said lot, which was at all times assessed as the property of the Pullen heirs. The tax receipts are shown in the Record, Pages 28 to 31, and a number of them are to John G. Heid as agent for the Pullen heirs, with a memorandum that it was paid by Wm. N. C. Waddleton. Plaintiff testified that the assessment to the Pullen heirs was always against his wish and protest. John G. Heid testified that as agent for the Pullen heirs he allowed the plaintiff to continue in the occupancy of the premises in consideration that he should pay the taxes, as during the greater portion of the period the lot had no particular rental value. According to Mr. Heid's testimony James H. Pullen was the owner of one-half of the lot and his sister, Mrs. Wilson, was the owner of the other half. Mr. Heid, under a power of attorney from James H. Pullen, executed a deed to the Defendant Milwee for the lot. (Record Pages 37 to 41.) The

above and foregoing is the substance of all the evidence bearing upon the questions involved.

ASSIGNMENTS OF ERROR.

1. The Court erred in refusing to grant the motion of the defendants made at the conclusion of the testimony, to instruct the jury to find for the defendants.

2. The Court erred in instructing the jury, peremptorily, to return a verdict for the plaintiff for an undivided two-thirds interest in the property in controversy.

ARGUMENT.

First—The theory upon which the trial court proceeded was that the plaintiff having shown prior possession, he was entitled to recover an undivided two-thirds interest upon such possession alone. The Court evidently overlooked the testimony of Mr. Heid that James H. Pullen was the owner of a one-half interest instead of only one-third interest, and

Second—That as to the remaining interest he was entitled to plead and maintain the title by limitation.

It may be conceded for the purpose of this argument, that the defendant Milwee was the owner of only an undivided interest in the lot, but legal title under the Government was conclusively shown to be in S. H. Milwee, Mary H. Wilson and Thomas H. Wilson as tenants in common, and the possession under the pleadings was in S. H. Milwee.

Unless then the plaintiff Waddleton showed some sort of title or right of possession of the property, he was not entitled to recover anything from a tenant in common in possession of the entire premises.

Dolph vs. Barney, 5 Ore. 191.
Dolph vs. Gold Creek M. & M. Co.,
6 L. R. A. N. S. 711.
Mather vs. Dunn, 74 Am. St. Rep. 788.

And a plea of title is sustained by proof of title to an undivided interest.

Stark vs. Barrett, 15 Cal. 362..
Mather vs. Dunn, supra.

Unless then there is some evidence upon which the jury were justified in finding that the plaintiff was entitled to the possession and ownership of the property by limitation, the Court should have peremptorily instructed them to find for the defendants.

Does the evidence justify any such finding?

Taking the testimony most strongly for the plaintiff it amounts to no more than this: that in a contest before the townsite trustee between himself and the true owners he was defeated and the patent title granted to his adversaries; that he was permitted to occupy the premises thereafter until dispossessed by the defendant, the grantee of one of the plaintiff's adversaries.

We think that this case is ruled by two decisions of this court. In the case of Jasperson vs.

Scharnikow, 150 Fed. 571, the facts were somewhat similar to those of the case above. In that case the Defendants in Error brought ejectment.. Their claim of title was by seizin under a patent from the United States issued in 1872, and the payment of all taxes assessed since that time. The Plaintiffs inError claimed right and title to said premises through their predecessor in interest, who, as they asserted, entered into th possession of the said premises in the year 1888 under a claim of right to the ownership thereof and adverse to all others and that such claim of right and possession was continuous, exclusive, actual and adverse for more than ten years preceding the commencement of the action. A verdict was directed for the plaintiffs in error. The trial court held that the entry of Bryant and wife, the predecessor of the plaintiff in error, was without any pretense "of having a right as owner of the property at the inception of their entry, which is necessary to make out a title by adverse possession. This idea of acquiring title by larceny does not go in this country. A man must have a bona fide claim, or believe in his own mind that he has got a right as owner, when he goes upon land that does not belong to him, in order to acquire title by occupation and possession. The defendant's evidence fails to show any claim of right in Bryant when he went on the land. There is not a particle of testimony that squints in the direction that he supposed he had any rightor that he went there for any other purpose than

to acquire right if he could do so by holding long enough without molestation." This court, after quoting the above language, says: "The entry in the present case was not made on any claim or color of title and it could not work a disseizin of the owner. The grantor of the plaintiffs in error was a trespasser, a squatter on the land. He knew that the land had been patented to another."

So in this case, the defendant in error knew that the land had been patented to another and he will not be heard now to say that notwithstanding that fact he still claims the land. The fact that the Pullen heirs permitted him to continue the occupancy did not work a disseizin.

The Case of *Center vs. Cady*, 184 Fed. 605.

The material facts so far as the case at bar is concerned, were that the party pleading title by adverse possesstion did so in the face of a judgment in ejectment against him; he had nevertheless been allowed to continue upon the land in controversy for more than ten years. This court said: "There can be no good faith in such a claim in the face of a decision of a court of competent jurisdiction adjudging that the claimant has no title or right of possession. In May 1903 the Court from which the present appeal is taken rendered a judgment in ejectment, adjudging the title to the premises here in controversy to be in the appellee. From that time on the appellent could not claim in good faith unless he acquired

a claim of title in some way other than by merely retaining possession of the premises."

These two cases we believe to be conclusive upon the defendant in error, and that his possession under the circumstances stated was not such as to entitle him to maintain a claim for title by adverse possession, and the motion of the plaintiffs in error for the court to instruct the jury to return a verdict for them should have been granted. The same rule is announced in Root vs. Woolworth, 150 U. S. 401. One of the points in that case was whether one holding possession after a decree against him settling the title to the land to be in another, could successfully plead title by adverse possession as against his former adversary, and it was held that such possession would be presumed to be held in subordination to the true owner until express notice was given that th actual possession was adverse. "Without such notice," says the Court, "the length of time intervening between the decree and the present suit would give him no better right than he previously possessed." (Page 415.)

Upon the question raised by the court's instructions to the jury to find peremptorily for the plaintiff for two-thirds undivided interest, we call the Court's attention to the case of Bradshaw vs. Ashley, 180 U. S. 59. The Court there had occasion to go into the question of the presumption of title arising from possession and as to when prior possession alone was sufficient to entitle the plaintiff to re-

cover and when it is not. On page 63 the Court says: "The question is what presumption arises from the fact of possession of real property? Generally speaking the presumption is that the person in possession is the owner in fee. If there be no evidence to the contrary, proof of possession, at least under a color of right, is sufficient proof of of title. Therefore, when in an action of ejectment the plaintiff proves that on the day named he was in the actual, undisturbed and quiet possession of the premises, and the defendant thereupon entered and ousted him, the plaintiff has proved a prima facie case, the presumption of title arises from the possession, and unless the defendant proved a better title, he himself must be ousted. Although he proves that some third person, with whom he in no manner connects himself, has title, this does him no good, because the prior possession was sufficient to authorize him to maintain it as against a trespasser, and the defendant being himself without title, and not connecting himself with any title cannot justify an ouster of the plaintiff. This is only an explanation of the principle that the plaintiff recovers upon the strength of his own title. His title by possession is sufficient, and it is a title, so far as regards the defendant who only got his possession by a pure tort, a simple act of intrusion or trespass with no color or pretense of title." And on page 64 the Court, quoting from Mr. Justice Matthews, says: "This rule is founded upon the presumption that possession peace-

ably acquired is lawful, and is sustained by the policy of protecting the public against violence and disorder. But, as it is intended to prevent and redress trespasses and wrongs, it is limited to cases where the defendants are trespassers and wrongdoers. It is, therefore, qualified in its application by the circumstances which constitute the origin of the adverse possession, and the character of the claim on which it is defended."

So in the case at bar when the plaintiff showed the circumstances under which his possession, whatever it may have been, as against James H. Pullen, the grantor of the defendant, originated, that it had been litigated and decided against him by a tribunal of competent jurisdiction, there could no longer be any presumption of title from such possession.

We respectfuly submit that the judgment should be reversed and the cause remanded with instructions to grant a new trial and upon such trial to direct a verdict for the defendants.

J. H. COBB,

Attorney for Plaintiffs in Error.